In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 379

ALL-STATE INDUSTRIES, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A5) is reported at 423 F. 2d 423. The order and opinion of the Federal Trade Commission denying petitioners' motion to dismiss (J.A. 27–33),[1] the initial decision and order of the hearing examiner (J.A. 117–131), and the final order and opinion of the Commission (J.A. 138–153) are not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) was entered on April 13, 1970. The petition for a writ of

[1] All "J.A." references are to the joint appendix before the court of appeals.

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certiorari was filed on July 11, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission's response to a Congressional inquiry disqualified it from adjudicating its unfair practices complaint against petitioners.

2. Whether, on the facts of this case, petitioners' failure to advise credit customers that their conditional sales contracts and promissory notes would be transferred to third parties and the possible consequences thereof, is a deceptive practice.

STATUTES INVOLVED

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(a), provides in part:

> (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * *, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Section 6 of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46, provides in part:

> That the Commission shall also have power—
>
> * * * * *
>
> (f) To make public from time to time such portions of the information obtained by it here-

under, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

STATEMENT

The Federal Trade Commission issued a complaint in June 1967 charging petitioners with making misrepresentations and using deceptive practices as part of a "bait and switch" scheme for selling residential aluminum siding, storm windows and storm doors, and other home improvement products (J.A. 13–14). The complaint alleged, *inter alia*, that in a substantial number of cases petitioners failed to advise credit purchasers that their conditional sales contracts and promissory notes would be negotiated or assigned to third parties to whom they would then be obligated for payment and against whom they might not be able to assert their claims under the purchase contracts (J.A. 9). The complaint explicitly stated that the Commission was taking official notice of the materiality of the failure to disclose (*ibid.*).

In February 1968, petitioners moved to dismiss the proceedings, relying in part upon alleged Commission prejudgment of the case as reflected in a letter signed by its then Chairman, Paul Rand Dixon (Pet. App. C1–C12). The letter was addressed to Senator Magnuson, as Chairman of the Senate Committee on Commerce, and was in response to the Senator's earlier

inquiry "requesting an outline of the Commission's current program in the area of home improvement frauds together with suggestions for additional legislation to improve the enforcement program in this field" (J.A. 29). The lengthy letter described the home improvement industry and some of the practices and artifices employed by the less scrupulous firms in the market (Pet. App. C1–C4). The letter further described the Commission's activities in the field and made recommendations for appropriate legislation (Pet. App. C4–C12).

In claiming that the Commission's response summarizing the sharp practices of certain "fringe operators" evidenced prejudgment of their case, petitioners focused upon the letter's statement that "generally speaking, these firms operate through a program of offering phony bargains, easy credit and exaggerated performance claims" (J.A. 17; Pet. App. C2). They also contended that the letter contained a detailed restatement of the allegations in the instant complaint, and noted the subsequent reference to two cases "presently being litigated" (*ibid.*). In a separate written opinion, the Commission denied prejudgment of either the facts or issues in the proceeding and refused to disqualify itself (J.A. 28–33).

The hearing examiner found petitioners to be engaged in "bait and switch" sales activities, but, *inter alia*, rejected the claim that failure to advise credit purchasers concerning the transfer of credit instruments and the possible consequences thereof was deceptive (J.A. 117–130). The Commission reversed the

hearing examiner, in part, finding the failure to disclose to be deceptive (J.A. 141–153). The latter finding was premised upon the practice's inherent unfairness and the Commission's official notice of facts demonstrating its capacity to deceive (J.A. 148–153).

The court of appeals unanimously affirmed the Commission's cease and desist order.

ARGUMENT

The issues presented are not substantial, were correctly decided below, and do not warrant review by this Court.

1. Congress has authorized the Federal Trade Commission "to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation". Federal Trade Commission Act, § 6(f), 38 Stat. 721, 15 U.S.C. 46(f). The Commission's letter to Senator Magnuson was written pursuant to this authority and reflected no prejudgment of the case. The letter was phrased in general terms and described a broad array of sharp practices employed by "fringe operators" in the home improvement field. That it is a description of fraudulent practices in the business, not a paraphrase of the complaint in this particular case, is readily apparent. As this Court stated in a similar context, "[i]f the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly

disqualify them from ever passing on another." *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 702. That proposition was rejected there and must also be rejected here.

Contrary to petitioners' suggestion (Pet. 5), there is no conflict with *Cinderella Career and Finishing Schools, Inc.* v. *Federal Trade Commission*, 425 F. 2d 583 (C.A. D.C.). That case does not hold that public reference to any pending case requires disqualification, but turns rather upon a case-by-case factual test: "[W]hether] a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it" (Pet. App. D16). See *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F. 2d 757, 763–768 (C.A. 6); *Texaco, Inc.* v. *Federal Trade Commission*, 336 F. 2d 754, 759–760 (C.A. D.C.), *vacated and remanded on other grounds*, 381 U.S. 739; *Amos Treat & Co.* v. *Securities and Exchange Commission*, 306 F. 2d 260, 267 (C.A. D.C.); *Gilligan, Will & Co.* v. *Securities and Exchange Commission*, 267 F. 2d 461, 468–469 (C.A. 2), certiorari denied, 361 U.S. 896. The court below applied this test but concluded on the facts that no prejudgment had been made. Moreover, in the discharge of its responsibilities to the public and Congress, an administrative agency may publicly state its general views on subjects within its competence. *United States* v. *Morgan*, 313 U.S. 409, 421. Nothing in the record here refutes the presumption that the Commissioners are "men of conscience and intellectual discipline, capable of judging a particular controversy fairly on

the basis of its own circumstances." *United States* v. *Morgan, supra* at 421.

2. Petitioners' contention that the Commission exceeded its powers in ordering disclosure to petitioners' customers that financing documents might be assigned to third parties is unfounded. Section 5 of the Federal Trade Commission Act is "* * * a broad delegation of power * * * to determine whether a method of competition or the act or practice complained of is unfair. The Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many and variable unfair practices which prevail in commerce. * * *' " *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 367; *Federal Trade Commission* v. *Texaco*, 393 U.S. 223, 226; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 720. Furthermore, "* * * when the Commission finds deception it is also authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a purchaser's decision to buy." *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392. A tendency or capacity to deceive is enough. *Portwood* v. *Federal Trade Commission*, 418 F. 2d 419, 421–422 (C.A. 10); *Montgomery Ward & Co.* v. *Federal Trade Commission*, 379 F. 2d 666, 670–671 (C.A. 7); *Double Eagle Lubricants, Inc.* v. *Federal Trade Commission*, 360 F. 2d 268 (C.A. 10).

The Commission found the petitioners' practice of assigning financing documents, without first informing credit purchasers of that fact and the possible consequences thereof, to be an inherently unfair trade

practice because the average consumer is unaware that he may thereby lose the threat of nonpayment as a lever to enforce his contract rights (J.A. 148–152). This determination was supported by experience gained in numerous investigations and more than a dozen cases (J.A. 152–153), which demonstrated that consumers are in fact deceived by this practice (J.A. 149–151, n. 17 and 21). Although petitioners were duly notified of the facts officially noticed (J.A. 9), they made no attempt to demonstrate the contrary. Since the findings of deception are warranted by the record and have a reasonable basis in law (*Atlantic Refining Co.* v. *Federal Trade Commission*, *supra* at 367; *Labor Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131), there is no basis for further review.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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